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No. 92-482

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

THE CHASE MANHATTAN BANK, N.A.,
Petitioner,

v.

AMERICAN LAND TITLE ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF FOR PETITIONER THE CHASE MANHATTAN BANK, N.A.

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The Respondents' Brief in Opposition in fact confirms that *certiorari* should be granted.

1. *All parties acknowledge a direct and irreconcilable conflict.* Petitioner, The Chase Manhattan Bank, N.A. ("Chase"),* the Acting Comptroller of the Currency and the Office of the Comptroller of the Currency (collectively, "OCC"),[1] and Respondents American Land Title Asso-

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* Chase's parent and nonwholly-owned subsidiaries are listed on page ii of the petition.

[1] The OCC's petition seeking review of the Second Circuit decision is captioned *Steinbrink* v. *ALTA*, No. 92-645.

ciation and New York Land Title Association (collectively, "ALTA"), all agree that the decision below and the recent decision of the District of Columbia Circuit in *Independent Ins. Agents of Am.* v. *Clarke*, 955 F.2d 731 (D.C. Cir. 1992), *petitions for cert. pending*, 61 U.S.L.W. 3266 (U.S. Sept. 18, 1992) (Nos. 92-484 & 92-507), are in direct conflict concerning whether Congress in 1918 repealed a provision of a 1916 Act of Congress formerly codified at 12 U.S.C. § 92. The critical significance of this admitted irreconcilable conflict is attested to by the fact that Petitioner, the Solicitor General and Respondents also concur that resolution of this conflict in favor of the position of the D.C. Circuit would compel this Court's vacation of the Second Circuit's judgment in the case below. Chase Pet. 9 n.14; OCC Pet. 18-19 n.13; ALTA Opp. 9 n.10. Indeed, notwithstanding being clad in the bright orange jacket of a brief in opposition, ALTA's "Opposition" expressly *supports* "grant[ing] the petitions here" under these circumstances. Opp. 9 n.10. ALTA's apparent ambivalence concerning the worthiness of this case for review also is reflected in a recent public statement by its executive vice-president: "In a way, I'm glad they've filed the cert petition. Hopefully, we'll have a definitive ruling." BNA Banking Report, Sept. 28, 1992 at 437.

2. *The decision below presents a double conflict.* If the Court affirms the Second Circuit's view that Section 92 remains law, the petitions of Chase and the OCC present a second issue of equally substantial importance over which the circuits are in conflict warranting this Court's review. The decision of the Second Circuit, flatly in conflict with the decision of the District of Columbia Circuit in *Independent Bankers Association* v. *Heimann*,[2] lays down a *per se* rule that every insurance agency activity by a national bank not expressly permitted by Section 92 is prohibited. Relying upon the 1968 decision

[2] 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).

of the Fifth Circuit in *Saxon* v. *Georgia Association of Independent Insurance Agents*,[3] which ruled that "'national banks have *no power* to act as insurance agents in cities of *over* 5,000 population,'"[4] the Second Circuit held that the language of Section 92:

> makes inescapable the conclusion that Congress intended this provision to apply to "*any . . . insurance company*," and a title insurance company surely is an insurance company. *Id.* Thus, section 92 impliedly bars national banks from engaging in the title insurance agency business.[5] (Emphasis added.)

Having held that Section 92 imposes a *per se* ban on all national bank insurance agency activities outside of small towns, the Second Circuit *refused* even to consider whether, because of its unique relationship to the mortgage lending business of national banks, title insurance agency business is authorized by 12 U.S.C. § 24 (Seventh) as incidental to the business of banking. Chase Pet. App. 15a-16a.

In sharp contrast, the District of Columbia Circuit held in *Heimann* that Section 92 does not restrict a national bank's authority to sell credit life insurance to towns of fewer than 5,000 persons because the sale of such insurance is incidental to banking and thus authorized by Section 24 (Seventh). 613 F.2d 1170.

ALTA attempts to minimize what it admits to be the "apparent conflict" between *Heimann* and the Second Circuit's decision below by listing four pages of supposedly "unique factors" that ALTA believes make credit life insurance more closely incidental to banking than is title insurance. Br. Opp. 12-16. As the OCC states in its petition, however, under the Second Circuit's "interpretation of Section 92 [this] asserted distinction is irrelevant, since

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[3] 899 F.2d 1010 (5th Cir. 1968).

[4] Chase Pet. App. 13a (emphasis added).

[5] Chase Pet. App. 14a.

whatever their differences, both title insurance and credit life insurance are forms of insurance." OCC Pet. 11.

The principal flaw in ALTA's argument is that ALTA overlooks the basis on which the Second Circuit decided the case. The Second Circuit, like the Fifth Circuit in *Saxon*, "did not rest its decision on the nature of the insurance activities engaged in by the bank" and, in fact, declined to undertake the type of analysis suggested by ALTA.[6] Chase Pet. App. 14a-16a. The court decided the case on the basis that Section 92 implicitly bars national banks in places of more than 5,000 inhabitants from engaging in *any* insurance agency activities, whether or not they are incidental to the business of banking.

The ruling of the District of Columbia Circuit in *Heimann* authorizing national banks to act as agent in the sale of credit life insurance simply cannot be reconciled with the *per se* bar adopted by the decision below. As the District of Columbia Circuit held in *Heimann*, and as the District Court and the Comptroller held below in this case, if Section 24 (Seventh) authorizes a particular insurance agency activity as incidental to banking, Section 92 poses no geographic barriers to the con-

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[6] ALTA's analysis of these factors would be relevant, if at all, to determining whether Section 24 (Seventh) authorizes the sale of title insurance as an incident to the business of banking, rather than to determining whether the purported *per se* rule of Section 92 prohibits this activity. In fact, this very type of analysis was conducted by the OCC in authorizing Chase's subsidiaries to sell title insurance. The OCC's determination is entitled to deference from the courts under *Chevron* and its progeny. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc., et al.*, 467 U.S. 837 (1984); *Clarke* v. *Securities Industry Association*, 479 U.S. 388 (1987). Based on its erroneous interpretation of Section 92, however, the Second Circuit never "decide[d] whether the title insurance agency business is 'incidental' to banking within the meaning of section 24 (Seventh)." Chase Pet. App. 16a.

duct of that lawful activity.[7] The conflict among the circuits concerning the relationship of Section 92 (assuming its existence) to the incidental powers of national banks under Section 24 (Seventh) could not be clearer.

3. *The 1915 and 1916 Interpretations.* ALTA acknowledges that the plain language of Section 92 states that its grant of power is "in addition to" those granted elsewhere to national banks. Br. Opp. 19. ALTA, however, attempts to displace this plain language by reference to two agency documents, published during the first Wilson Administration, stating that Section 24 (Seventh) did not grant national banks the power to act as general insurance agents in the sale of "fire, cyclone, liability, or other types of insurance." Br. Opp. 2-3, 19, 1a-8a.

The most glaring defects in ALTA's statutory analysis are: (1) that those administrative interpretations are of Section 24 (Seventh), not Section 92; (2) those administrative interpretations relate to general insurance agency activities and do not purport to address whether more specialized forms of insurance agency activities, such as title insurance or credit life insurance, might be incidental to banking; and (3) the Comptroller has, over the course of the 75-year period following the issuance of the agency documents on which Respondents rely, addressed the specific issue whether the sale of various types of specialized insurance is incidental to the business of banking and authorized under Section 24 (Seventh) and has determined in a number of cases that they are.[8]

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[7] Having determined nine years earlier in *Heimann* that Section 92 is irrelevant to whether a national bank can sell specialized forms of insurance as being incidental to banking pursuant to Section 24 (Seventh), the District of Columbia Circuit held in *American Insurance Association* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988), that national banks are authorized to sell municipal bond insurance as an incident to the business of banking.

[8] Finally, ALTA attempts to beef up its unsupportable statutory analysis by referring to two sections of the National Bank Act that this Court has interpreted as impliedly limiting the powers of

4. *The decision below sharply curtails the fundamental statutory authority of all national banks.* The Second Circuit's *per se* rule raises issues of critical importance to the national banking system because it applies to any and all types of bank insurance agency activities. In the Second Circuit, ALTA argued that Section 92 "impliedly prohibits national banks from selling insurance—including title insurance—in towns with more than 5,000 inhabitants." Chase Pet. App. 11a. Having persuaded the Second Circuit that there is an implicit bar in Section 92 applicable to all forms of insurance, ALTA now attempts to narrow the broad scope of that decision by arguing that it "relates only" to the sale of title insurance by national banks and thus does not raise issues of importance meriting this Court's review. Br. Opp. at 17. No amount of Respondent's post hoc linguistic contortions, however, can hide the fact that the Second Circuit has adopted a *per se* rule applicable to the sale of any and all forms of insurance by national banks. As noted above, the Second Circuit did not predicate its *per se* rule "on the nature of the insurance activities engaged in by the bank." Chase Pet. App. 14a. Instead, like the *Saxon* court on which it relied, the Second Circuit viewed Section 92 as an expression of "Congress' intent that 'national banks have *no power* to act as insurance agents in cities of *over* 5,000 population.'" *Id.* (Emphasis added.)

As explained in the petitions of Chase and the OCC, national banks long have engaged in a variety of specialized insurance agency activities held by the Comptroller

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national banks. Br. Opp. 20 n.23. Unlike Section 92, neither of those two sections—12 U.S.C. §§ 81, 90—contains language stating that its grant of powers is "in addition to" other powers granted by the National Bank Act. Had those statutes contained such language, the result of the two Depression-era cases cited by ALTA likely would have been different.

As its plain language states, Section 92 is a grant of additional powers, not an implied limit on the incidental powers granted to national banks by Section 24 (Seventh).

to be "incidental to banking" and authorized by Section 24 (Seventh). Chase Pet. 14-18. OCC Pet. 17-18. All of these Section 24 (Seventh) insurance agency activities would be prohibited under the Second Circuit's *per se* rule. *Id.* Moreover, as noted by the American Bankers Association in its *amicus* brief, "borrowing" statutes in 38 states upon which state banks rely for their incidental powers broaden the direct impact of the issue beyond national banks to reach banks in those 38 states. ABA Br. at 12.

CONCLUSION

For the reasons stated herein and in our petition, the petition for *certiorari* should be granted.

Respectfully submitted,

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